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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

EASTERN CONNECTICUT CITIZENS ACTION GROUP, INC., *et al.*,
Petitioners

v.

ELIZABETH H. DOLE, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 4, 1987

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QUESTION PRESENTED

Does the "ripeness doctrine" bar a property owner's challenge under the National Environmental Policy Act to right-of-way acquisition where condemnation has proceeded in anticipation of highway construction, but permits which would allow the actual construction of the highway have not yet been obtained.

LIST OF PARTIES

The parties to the proceeding below were the petitioners Eastern Connecticut Citizens Action Group, Inc.; Stop-I-84, Inc.; Edith and Herman Petersen, Joseph and Dorothy Conley; Chester Heckler, Barbara Czerwinski; Ronald and Deborah Beaudoin; Ernest and Connie Grondin; Wayne Fritz; Mark and Laurel House; Vera and Francis Mullen; William A. and Evelyn Dickson; John and Kathleen Pagini; Peter and Chris House; Herbert and Karen Van Kruiningen; Elizabeth and Larry Warren; Cathy and James Klein; Linda and Robert Labenski; Tonny and John Verfaille; Anthony and Angeline Armentano; Carol and George Dolleris; Norman and Frances Hosford; Edward F. Turn. The Respondents were Defendants, Elizabeth H. Dole, in her official capacity as Secretary of the United States Department of Transportation, John Bestgen, in his official capacity as Regional Federal Highway Administrator for Region I, James J. Barakos, in his official capacity as Division Administrator for Connecticut, Federal Highway Administration, and J. William Burns, in his official capacity as Commissioner, Connecticut Department of Transportation.

None of the petitioners are a corporation which have subsidiaries which should be listed pursuant to Rule 28.1.

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v.

ELIZABETH H. DOLE, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners seek a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on November 7, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is unreported and is reprinted in the appendix attached hereto, p. 1a, infra.

The memorandum of the United States District Court for the District of Connecticut (Cabranes, J.) has been reported at 638 F. Supp. 1297 (D. Conn. 1986) and is reprinted in the appendix attached hereto at pp. 3a-10a.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. Section 1331 and 1332, et al., the petitioners brought suit in the District of Connecticut seeking injunctive relief against respondents claiming, inter alia, that respondents had violated Section 102(2)(c) of the National Environmental Policy Act (hereinafter "NEPA"). On July 21, 1986 the court denied the petitioners' Motion for Summary Judgment and granted the respondents' Motion for Summary Judgment on the grounds of ripeness (see pp. 6a-8a, infra).

On the petitioners appeal, the Second Circuit on November 7, 1986 affirmed the judgment and incorporated the District Court's order of dismissal without prejudice (see p. 2a, infra). No petition for rehearing was sought.

The jurisdiction of this court to review the judgment of the Second Circuit is invoked pursuant to Title 28 U.S.C. Section 1254(i).

STATUTE INVOLVED

42 U.S.C. Section 4332 Cooperation of agencies—Reports—Availability of Information—Recommendations—International and National Coordination of Efforts.

The Congress authorizes and directs that to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 U.S.C. Sections 4321, et seq.], and (2) all agencies of the Federal government shall—(a, b) [the text of these subsections is omitted as not being pertinent to this appeal] (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii)

alternatives to the proposed action, (iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long-term productivity and, (v) any irreversible and irretrievable commitments of resources which should be involved in the proposed action should it be implemented . . . (d)-(i) [the text of these subsections is omitted as not being pertinent to this appeal] (January 1, 1970, P.L. 91-190, Title I, Section 102, 83 Stat. 853; August 9, 1975, P.L. 94-83, 89 Stat. 424).

STATEMENT OF THE CASE

Two environmental organizations and 38 individually named plaintiffs sought injunctive relief against Federal and State transportation agencies in connection with the proposed construction of an 11-mile limited access highway known as Relocated Route 6. The individual plaintiffs are homeowners whose property is subject to pending condemnation in preparation for the proposed highway construction (infra, p. 9a).

On September 30, 1985, Elizabeth Dole authorized the State of Connecticut Department of Transportation (ConnDOT) to commence right-of-way acquisition and construction of Relocated Route 6. Federal location, design and engineering approvals have previously been obtained. Federal funds have been obligated for the construction. Pursuant to this authorization, ConnDOT has commenced condemning the homes of the named plaintiffs under its eminent domain powers.

Before actual construction of the highway can occur, ConnDOT must still obtain various State and Federal permits governing the protection of environmental resources. ConnDOT's application to the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. 1344, to permit the filling of wetlands, is pending.

The Plaintiffs sought an injunction restraining, inter alia, the acquisition of their homes, alleging violations of NEPA, including, inter alia, the failure to adequately consider reasonable alternatives to the proposed highway. The District Court, on cross-motions for Summary Judgment, ruled that since further permits were necessary before actual construction of the highway can be commenced, the action was not ripe for review. The Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Requiring A Challenge Under The National Environmental Policy Act To The Condemnation Of Residential Property To Await The Completion Of All Administrative Permit Procedures Is In Direct Conflict With Decisions Of This Court And Other Circuits.

The underlying issue pending in this case concerns the propriety under NEPA of actions taken by state and federal agencies in authorizing condemnation of residential properties in anticipation of highway construction. Secretary Dole has completed her review of the highway proposal and authorized right-of-way acquisition and construction. The petitioners brought suit in the District Court alleging that Dole's agency failed to adequately consider reasonable alternatives to the highway proposal prior to such authorization. In response, respondents sought dismissal because actual construction cannot begin until competition of the review of its "wetlands" permit application currently pending before the U.S. Army Corps of Engineers. The District Court agreed and dismissed the action, holding that petitioners' NEPA challenge to the acquisition of their properties was not ripe as there exists a possibility that such permit may not be granted and the highway not constructed. The Second Circuit affirmed.

Without Congressional authorization, the Second Circuit has effectively amended NEPA, virtually requiring an exhaustion of all agency procedures prior to any challenge, regardless of its merits, by property owners whose land is being condemned in connection with the challenged proposal. By adding this "exhaustion" requirement to NEPA, the Court has departed from established precedent and endorsed "the discomfort" that a person may experience as a result of the "uncertainties" in his "lifestyle" while a condemnation proceeding takes effect (see infra, 9a). The Second Circuit's decision directly conflicts with this Court's holding in *Aberdeen and R.R. Co. v. Student's Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 95 S. Ct. 2336, 45 L. Ed. 2d 191 (1975) (hereinafter referred to as "SCRAP"), wherein this Court held that NEPA creates a "right of action in adversely affected parties" to enforce the obligations of NEPA, even where the activity challenged is only "interim" in nature. As stated by this Court, "notions of finality and exhaustion do not stand in the way of judicial review" of a proposal subject to NEPA, even where other aspects of the proposal may not be ripe for review. 95 S. Ct. at 2355.

As recognized by this Court in SCRAP, judicial intervention under NEPA is not an "all or nothing" proposition. SCRAP illustrates the proposition that both the level of environmental consideration required by the agency and the level of scrutiny imposed by the Courts varies with the effect and context of the challenged decision. Supra, at 2358.

The underlying decision in this case conflicts with SCRAP in failing to recognize (1) that "adversely affected parties" are entitled to early and timely review under NEPA, and (2) that judicial review of NEPA compliance is required even at "interim" stages of administrative proceedings. Properly applied, *SCRAP* precludes the use of ripeness as a basis of dismissal in a

NEPA action where parties are adversely affected by a decision of an administrative agency. *Township of Parsinopany-Troy Hills v. Costle*, 503 F. Supp. 314, 319 (D.N.J. 1979) affirmed w/o/op., 639 F. 2d 776 (3rd Cir. 1979) ("NEPA is, by its own terms, addressed to agency action which is non-final"). Nor should the ripeness doctrine bar review of any agency decision where its effects are felt in a "concrete way" by challenging parties. *Abbott Laboratories v. Gardner*, 378 U.S. 136, 148-9, 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967).

Equally in conflict with the decision of the Second Circuit is *National Wildlife Federation v. Snow*, 561 F. 2d 227 (D. C. Cir. 1976), which held that the presence of NEPA violations may be so "intertwined" with the issue of harm as to preclude the application of the ripeness doctrine. In that case, the District of Columbia Circuit allowed Plaintiffs to challenge the adoption of a regulation authorizing the advance acquisition of highway right-of-way parcels. Judge Leventhal rejected the government's claim that such a challenge should await final agency approval of actual highway "location" decisions, stating:

> By the time of this location phase, need has already been established to the satisfaction of those planning the highways. By the time a proposal reaches the location phase—when a NEPA statement and the first public hearing are normally required—the route has already been put on a federal-aid system by the FHWA and has been included in the construction program submitted annually by the state.
>
> * * * *
>
> Since the challenged regulation is presently being implemented, the prospect of present and continuing harm to petitioners is substantial—if they are right in their assertions that the procedures mandated by the Highway Act and NEPA are being evaded. The issue of harm and the issue on the merits are intertwined. Sound principles of judicial administration

> lead us to conclude that review of the core legal question cannot fairly be delayed until after the particular location decisions have been made and approved. 561 F. 2d at pp. 234, 237.

The Second Circuit's decision also is in conflict with other decisions of the Circuit Courts which have recognized that protecting the integrity of the decisionmaking process itself is the goal of NEPA, not merely preventing harm to the environment. See *Commonwealth of Massachusetts v. Watt*, 716 F. 2d 946, at 952 (1st Cir. 1983) ("when a decision to which NEPA obligations attach is made without the informed environmental consideration which NEPA requires, the harm that NEPA intends to prevent has been suffered"); *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978); *Port of Astoria, Oregon v. Hodel*, 595 F. 2d 467, 477-479 (9th Cir. 1979) (injuries within the scope of NEPA production need not wait until such time that harm is intensified but should be addressed when alternative courses of action are still possible and environmental damage can be mitigated).

The Second Circuit's decision is also in conflict with other circuits which have consistently recognized that an agency's decision to abandon or alter the project, after acquisition of property has been accomplished, would become "increasingly undesirable". *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1329 (4th Cir.), cert. denied, 409 U.S. 1000, 93 S.Ct. 312, 34 L.Ed 2d 261 (1972). Allowing such acquisition would create a "sham of the reconsideration required by Federal law." *Id.* (footnote omitted). See *Stuebing v. Brinegar*, 511 F.2d 489, 497 (2d Cir. 1975); *Environmental Defense Fund v. Tennessee Valley Authority*,, 468 F.2d 1164 (6th Cir. 1972); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Keith v. Volpe*, 352 F.Supp. 1324 (C.D. Cal. 1973), aff'd, 506 F.2d 696 (9th Cir. 1974).

CONCLUSION

This is not the first case in which a proposal subject to NEPA review passes through the hands of more than one agency responsible for the proposal's approval. See *Commonwealth of Massachusetts v. Watt*, supra. In some cases, one agency's NEPA review will consist of a review of another agency's previous NEPA process, as in this case, where the Army Corps of Engineers has the power to order Respondent Dole to supplement her agency's environmental review. Infra, pp. 7a-8a.

Review of the decision below is necessary as the Second Circuit has required the petitioners to live on borrowed time while respondents "stack the deck" against those who have the most to lose. The decision encourages the postponement of "final" decisionmaking while agencies commit resources toward a preferred course of action and avoid judicial review of "interim" processes.

A judicial opinion can hardly be said to be "advisory" where it may preclude execution of a decision to condemn residential property. Must judicial review of such a decision await completion of another agency's administrative process? Should review under NEPA be postponed until the imminence of environmental harm? The decision of the Second Circuit weakens and undermines the "private attorney general" role played by citizen groups and individuals concerned with the enforcement of NEPA and similar public interest statutes. See generally, *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985); *Aleyska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

For the foregoing reasons, petitioners respectfully submit that this petition should be granted and a writ of certiorari issue to review the Judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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February 4, 1987

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 1986

No. 403

Docket No. 86-6162

EASTERN CONNECTICUT CITIZENS ACTION GROUP, INC., *et al.*,
Plaintiffs-Appellants,

—against—

ELIZABETH H. DOLE, *et al.*,
Defendants-Appellees.

Argued: November 3, 1986 Decided: November 7, 1986

Before: FEINBERG, Chief Judge, OAKES and KEARSE, Circuit Judges.

Appeal from an order of the United States District Court for the District of Connecticut, Jose A. Cabranes, J., granting summary judgment to defendants. Affirmed.

JON D. BERMAN, South Windsor, CT (Berman, Curry & Russo, of Counsel), for Plaintiffs-Appellants.

JACQUES B. GELIN, Attorney, Department of Justice, Washington, DC (F. Henry Habicht II, Assistant Attorney General, Stanley A. Twardy, Jr., United States Attorney, New Haven, CT, John B. Hughes, Assistant United States Attorney, New Haven, CT, David C. Shilton, Attorney, Department of Justice, Washington, DC, of Counsel), for Defendants-Appellees Elizabeth H. Dole, John Bestgen and James J. Barakos.

KATHRYN MOBLEY, Assistant Attorney General, State of Connecticut, Hartford, CT (Cornelius F. Tuohy, Robert T. Morrin, Assistant Attorneys General, State of Connecticut, Hartford, CT, of Counsel), for Defendant-Appellee J. William Burns.

PER CURIAM:

This is an appeal from an order of the United States District Court for the District of Connecticut, Jose A. Cabranes, J., granting summary judgment to defendants and dismissing for lack of ripeness plaintiffs' lawsuit seeking injunctive and declaratory relief. 638 F. Supp. 1297 (D. Conn. 1986). Plaintiffs claim, among other things, that defendants have failed to comply with the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. We affirm for substantially the reasons stated in Judge Cabrane's opinion. Our decision is without prejudice to whatever rights plaintiffs may have in state court to challenge under state law the State of Connecticut's acquisition of property in connection with a proposed highway project.

UNITED STATES DISTRICT COURT
D. CONNECTICUT

Civ. No. H-86-286 (JAC)

EASTERN CONNECTICUT CITIZENS ACTION GROUP, INC., *et al.*

v.

ELIZABETH H. DOLE, *et al.*

July 21, 1986

Jon D. Berman, Windsor, Conn., for plaintiffs.

John B. Hughes, New Haven, Conn., for Federal defendants.

Cornelius F. Tuohy, Kathryn Mobley, Robert T. Morrin, Hartford, Conn., for State defendant.

John F. McKenna, Hartford, Conn., for amici curiae Town of Windham, Town of Manchester and Greater Manchester Chamber of Commerce.

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

JOSÉ A. CABRANES, District Judge:

This action to enjoin the construction of a proposed four-lane expressway, known as "Relocated Route 6," between the eastern Connecticut towns of Bolton and Windham is before the court on cross-motions for summary judgment.

The plaintiffs in this action are the Eastern Connecticut Citizens Action Group, Inc. and Stop I-84, Inc., both of which claim to be non-profit membership corporations, and 38 individuals who claim to own property that will be taken or diminished in value as a result of the construction of Relocated Route 6. The defendants are Elizabeth H. Dole, Secretary of the United States Department of Transportation ("DOT"); John Bestgen, regional administrator for the Federal Highway Administration ("FHWA"); James J. Barakos, division administrator of the FHWA for Connecticut; and J. William Burns, commissioner of the Connecticut Department of Transportation ("ConnDOT").

The plaintiffs contend that the defendants have failed (1) to consider alternatives to the Relocated Route 6 proposal in violation of Section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; (2) to prepare a new or supplemental environmental impact statement in violation of NEPA and the regulations promulgated thereunder; (3) to comply with NEPA and the relevant regulations in preparing an environmental assessment/re-evaluation/section 4(f) statement; (4) to comply with Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 1651 *et seq.*, and the Federal-Aid Highway Act, 23 U.S.C. § 101 *et seq.*, in evaluating the impact of the proposed highway on public parklands, state forests and historic sites; (5) to comply with federal regulations governing the submission of concept plans pursuant to 23 U.S.C. § 103(e)(4); and (6) to consider alternatives to the impact of the proposed highway on wetlands in violation of DOT Order 5610.1B and Presidential Order 11190. The plaintiffs also contend that the defendant Burns will deprive them of property rights without due process of law by proceeding with right-of-way acquisitions before obtaining a permit for the proposed highway from the United States Army Corps of Engineers ("Corps of Engineers") pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

The plaintiffs seek a declaratory judgment that the defendants failed to comply with the federal environmental laws as well as a preliminary and permanent injunction against further financing, disbursement of funds, planning, acquisition of land, contracting for or construction of the proposed Relocated Route 6. They also seek an order directing the defendants to rescind their approval of property acquisitions, designs for the proposed highway and the final environmental impact statement with respect to the proposed highway.

Discussion

The defendants contend in support of their motion for summary judgment that the plaintiffs' claims are not ripe for judicial review because there has been no "final" administrative action that would permit the construction of the proposed highway.

Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides, with certain exceptions not relevant here, that only "final agency action" is subject to judicial review. The finality requirement of Section 10(c) is to be interpreted in "a pragmatic way," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967), "with an eye toward protecting agencies from the disruption of piecemeal appeals and toward insuring that judicial review involves concrete disputes over meaningful interests, rather than abstract disputes over hypothetical governmental actions." *National Wildlife Federation v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir.1982), *aff'g* 504 F.Supp. 314 (D.Conn.1980).

In determining whether an action ought to be dismissed on ripeness grounds, the court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner, supra*, 387

U.S. at 148-149, 87 S.Ct. at 1515. Moreover, any such hardship must be "immediate and practical," *Frozen Food Express v. United States*, 351 U.S. 40, 44, 76 S.Ct. 569, 571, 100 L.Ed. 910 (1956), rather than remote and speculative. *See also Diamond Shamrock Corporation v. Costle*, 580 F.2d 670, 672 (D.C.Cir.1978) ("[w]hat is required is that the interests of the court and agency in postponing review until the question arises in some more concrete and final form, be outweighed by the interest of those who seek relief from the challenged action's 'immediate and practical impact' upon them").

The requirement of finality has frequently been applied in actions seeking to enjoin the construction of highways on environmental grounds. *See National Wildlife Federation v. Goldschmidt, supra*, 504 F. Supp. at 323 and cases cited therein. As our Court of Appeals has observed, "[t]he circumstances in which agency actions involving environmental concerns and highway construction are reviewable cannot be spelled out in exact detail." *National Wildlife Federation v. Goldschmidt, supra*, 677 F.2d at 264. Instead, a court must take a "common sense" approach to the question of finality. *Id.* Accordingly, the court turns to an examination of the facts of the instant case.

1. *The fitness of the issues for judicial decision*

It is not disputed that the DOT has approved a so-called "final environmental impact statement" and a subsequent "environmental assessment" with respect to the proposed highway.[1] *See* Complaint ¶ 54; Affidavit of

[1] The environmental impact statement was prepared in the early 1970s when the Bolton-Windham highway was to have been a segment of the proposed Interstate 84 linking Hartford, Connecticut, and Providence, Rhode Island. The environmental assessment was intended to reevaluate the Bolton Windham highway in light of the abandonment of the interstate project. The environmental assessment was released in final form in October 1985.

James F. Byrnes, Jr. (filed June 23, 1986) ("Byrnes Affidavit") ¶ 5. It is likewise not disputed that construction of Relocated Route 6 cannot commence until ConnDOT obtains permits from the various state and federal agencies that still must evaluate the environmental implications of the proposed highway. *See* Byrnes Affidavit ¶ 6. These agencies include the Corps of Engineers and the Connecticut Department of Environmental Protection.[2] *See id.* at ¶¶ 7-9; *see also* Complaint ¶¶ 93-95, 101.

Indeed, the plaintiffs anticipate that the Corps of Engineers will hold a public hearing before deciding whether to issue any permit for the construction of the highway pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. *See* Complaint ¶ 97. They expect to take part in the permit process "including participation at any public hearing held by the Corps." *Id.* ¶ 98.

It is evident that the environmental impact statement and environmental assessment may have to be revised, or that the plans for the highway may have to be altered or even abandoned, as a result of the evaluations that

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[2] The plaintiffs contend for the first time in their Supplemental Memorandum on the Issue of Ripeness (filed July 16, 1986) ("Supplemental Memorandum") that "there is nothing preventing the Defendants from commencing construction or other construction-related activities in non-wetland areas" prior to the review of the project by the Corps of Engineers and the Department of Environmental Protection. However, the plaintiffs have offered no evidentiary support to controvert the sworn statement of James F. Byrnes, Jr., ConnDOT's director of environmental planning, that "[u]ntil such time as ConnDOT has obtained the . . . federal and state permits, actual construction of Relocated Route 6 as proposed cannot occur." Byrnes Affidavit ¶ 9. Accordingly, the court accords no particular weight to the plaintiffs' assertions in this regard. Of course, if the defendants should begin construction of the highway prior to the completion of administrative review by the Corps of Engineers and the Department of Environmental Protection, the plaintiffs are free to seek appropriate judicial relief.

still must be undertaken by the Corps of Engineers and the Department of Environmental Protection. *See id.* ¶ 96. Indeed, the plaintiffs state in their complaint that "the Corps has indicated that with respect to the Section 404 permit, 'a more detailed alternative discussion will be required.'" *Id.* ¶ 99, *quoting* correspondence of William F. Lawless, chief of the regulatory branch of the Corps of Engineers. Counsel for the federal defendants likewise indicated at oral argument on July 11, 1986, that the Corps of Engineers is likely to require supplementation of the environmental impact statement and environmental assessment.

Accordingly, in light of this undisputed evidence, the court finds that the issues raised by the plaintiffs are not yet fit for judicial decision.

2. *The hardship to the parties of withholding court consideration*

The defendants have repeatedly emphasized in their papers and at oral argument that no construction work will begin on the proposed highway until the necessary permits have been obtained from the Corps of Engineers and the Department of Environmental Protection. *See, e.g.*, Byrnes Affidavit ¶¶ 6, 10. Accordingly, a decision by the court to defer consideration of the plaintiffs' claims until the highway proposal has been evaluated by those agencies would not "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(c). Moreover, the plaintiffs would then have an opportunity to present their environmental concerns to these agencies, which, unlike a reviewing court, can "interject [themselves] within the area of discretion of the executive as to the choice of the action to be taken." *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-228, 100 S.Ct. 497, 500, 62 L.Ed.2d 433 (1980) (discussing narrow scope of judicial review of agency decisions subject to NEPA); *see also Sierra Club v. United*

States Army Corps of Engineers, 772 F.2d 1043, 1050 (2d Cir. 1985).

Many of the plaintiffs appear to be less concerned about the environment, however, than about the prospect of losing some or all of their property to the proposed highway. They contend that the mere acquisition of their land by the State of Connecticut will cause them a substantial hardship, even if they are paid just compensation and are permitted to remain on the land at a fair rent pursuant to state law until construction begins, because "[t]here is no reason to believe that [they] would want to continue to occupy their properties . . . encumbered by the uncertainties of such a lifestyle." Plaintiffs' Supplemental Memorandum on the Issue of Ripeness (filed July 16, 1986) at 5.[3]

The court does not entirely disregard the discomfort that a person may experience as a result of "uncertainties" in his "lifestyle" that may not be resolved for some months. Of course, the plaintiffs apparently have managed to live with similar "uncertainties" throughout most of the approximately fifteen years since the route of the proposed highway was selected. It is clear in any event that whatever "immediate and practical" hardships may be suffered by the plaintiffs are substantially outweighed by the benefits that may be gained by deferring judicial review until the administrative decision to build the proposed highway becomes truly "final." Accordingly, inasmuch as the plaintiffs did not dispute at

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[3] The plaintiffs also contend that, if the highway proposal is ultimately abandoned by the defendants, "there is no procedure under either State or Federal law allowing the former owners of property taken by condemnation in connection with an abandoned proposal to repurchase said property from the State." Supplemental Memorandum at 2. However, the court takes note of the representations of defendant Burns in his Response to Plaintiffs' Supplemental Memorandum on the Issue of Ripeness (filed July 17, 1986) that C.G.S. § 13a-73(c) "authorizes the Commissioner to sell property back to the plaintiffs." *Id.* at 3.

oral argument that a decision adverse to them on the ripeness issue would foreclose present judicial consideration of all of their pending claims, the action shall be dismissed without prejudice to renewal upon the completion of administrative action.

Conclusion

For the reasons stated above, the defendants' motion for summary judgment is granted, and the plaintiffs' cross-motion for summary judgment is denied.[4] This action shall be dismissed without prejudice to renewal upon the completion of final administrative action. The Clerk is hereby instructed to retain the full record of this case for use in the event that the plaintiffs renew any or all of their claims at some future date.

It is so ordered.

[4] Of course, the court intimates no views at this time with respect to the other claims raised in the cross-motions for summary judgment.

(3)

Supreme Court, U.S.
FILED
MAR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1277

In The Supreme Court Of The United States

OCTOBER TERM, 1986

EASTERN CONNECTICUT CITIZENS ACTION GROUP, INC. ET AL.,
Petitioners,

v.

ELIZABETH H. DOLE, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The opinion of the United States Court of Appeals for the Second Circuit is now reported at 804 F.2d 804 (2d Cir. 1986).

STATEMENT OF THE CASE

In addition to the facts stated by the petitioners, the District Court also found that the necessary environmental impact statement and environmental assessment may have to be revised, or that the plans for the highway may have to be altered or even abandoned, as a result of the evaluations that the Army Corps of Engineers and the Connecticut Department of Environmental Protection must still undertake. Petitioners' Appendix (Pet. App.) at 7a–8a.

REASONS FOR DENIAL OF THE PETITION

1. The essence of the petitioner's claim is that the District Court, in deciding that the petitioner's request for injunctive relief was not ripe, improperly resolved the conflict between the government's interest in continuing to plan an eleven mile highway and the interest of homeowners in preventing the condemnation of their property as a result of the highway proposal. This claim does not merit a discretionary grant of certiorari. The precise balance to be struck between the two competing interests at stake is a matter best entrusted in the first instance to the District Court, since the District Court has the complete factual record before it and must make what is essentially a discretionary decision. *See Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir.), *cert. denied*, 106 S.Ct. 344 (1985). Review by the Court of Appeals, moreover, provides a sufficient check against a District Court's abuse of discretion. *Id.* at 802.

The requirement in the Administrative Procedure Act that a party seeking to appeal an administrative decision await "final agency action" is one to be interpreted in a "pragmatic way." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In determining whether an appeal is premature and therefore subject to dismissal on ripeness grounds, it is the responsibility of the District Court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* It is difficult in this context to "adopt . . . a mechanical rule" because the circumstances calling for early review "cannot be spelled out in exact detail." *National Wildlife Federation v. Goldschmidt*, 677 F.2d 259, 264 (2d Cir. 1982). In short, a case of this nature is invariably a fact-specific one with only limited precedential value for future cases. As such, it is one properly left to the lower federal courts and inappropriate for a grant of certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (This Court does not "grant a certiorari to review evidence and discuss specific facts.").

2. The situation might differ if a per se rule existed, or should exist, that would prevent a District Court from dismissing on ripeness grounds a challenge, such as the one here,

under the National Environmental Policy Act (NEPA) by property owners to a proposed highway once property condemnation proceedings have begun. Neither precedent nor policy, however, supports such a rule.

Despite the petitioners' claim of a conflict in the decisional law, not one case cited by the petitioners stands for the proposition that a District Court must necessarily enjoin, due to alleged NEPA violations, the completion of a highway construction plan once the government has reached the stage at which it begins to acquire rights-of-way and to condemn property. The petitioners initially attempt to establish such a rule by quoting this Court's language in *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures,* 422 U.S. 289 (1975) *(SCRAP),* that "notions of finality and exhaustion do not stand in the way of judicial review [of a proposal subject to NEPA], even though other aspects of the [proposal] are not ripe for review." *Id.* at 319. But the petitioners have simply omitted the introductory phrase in this quotation which, when added, changes the whole meaning:

> *When agency or departmental consideration of environmental factors in connection with that "federal action" is complete,* notions of finality and exhaustion do not stand in the way of judicial review of the adequacy of such consideration, even though other aspects of [the proposal] are not ripe for review.

Id. (emphasis added). Thus in *SCRAP* this Court decided to review the Interstate Commerce Commission's evaluation of the environmental impact of new railroad freight rates on the theory that, although the rates were subject to further Commission consideration, their environmental impact was not. *Id.* at 316–19. The rule in *SCRAP* would quite clearly not apply when, as here, governmental agencies intend to conduct further environmental review.

The petitioners gain no greater support from the decisions of the lower federal courts that they cite. *National Wildlife Federation v. Snow,* 561 F.2d 227 (D.C. Cir. 1976), involved not an injunction against an actual highway project but rather an

injunction against an allegedly invalid federal regulation governing the number and timing of highway project public hearings. The question was strictly a legal one in which, unlike the situation here, further factual developments would make no difference. *Id.* at 236. The other cases cited by the petitioners merely acknowledge, at least implicitly, that the need for accurate environmental information and the possibility of bureaucratic inertia are important factors in deciding whether to enjoin a pending highway proposal that has reached the condemnation stage. They do not, however, go so far as to hold that these factors are dispositive. *See, e.g., Environmental Defense Fund v. Tennessee Valley Authority,* 468 F.2d 1164, 1183 (6th Cir. 1972) (district court considered irreparable harm to both parties and concluded that scales tipped in favor of plaintiff environmental groups and property owners).

The per se rule suggested by the petitioners would also make little sense as a matter of policy. However strong the force of bureaucratic inertia, that force is far from irreversible. The petitioners' per se rule would require a District Court to ignore the possibility, which may be very real in any given case, that government agencies will alter or abandon their proposal in light of subsequent evaluations. And the petitioners' proposal would present the very significant risk of disruption of the administrative process through piecemeal appeals. *See Abbott Laboratories v. Gardner,* 387 U.S. at 148–49. Only with the existing "pragmatic" finality doctrine, *id.* at 149, which treats no one factor as conclusive, will these important concerns receive due consideration.

3. Although the District Court quite properly did not deem the alleged hardship resulting from imminent condemnation proceedings as dispositive of the question of finality, it did—also quite properly—weigh this hardship into the balance of equities. The Court specifically recognized the "discomfort that a person may experience as a result of 'uncertainties' in his 'lifestyle' that may not be resolved for some months." Pet. App. at 9a. The Court merely declined to find this factor as weighty as the government's interest in continuing with the highway approval process. There is nothing inherently wrong about such a decision. The Court of Appeals has reviewed it and summarily affirmed. No basis exists for further review.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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No. 86-1277

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In the Supreme Court of the United States

OCTOBER TERM, 1986

EASTERN CONNECTICUT CITIZENS ACTION GROUP, INC., ET AL., PETITIONERS

v.

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioners contend that the courts below erred in dismissing their claims on ripeness grounds.

1. Petitioners are two environmental organizations and 38 individuals who claim to own property that will be taken or diminished in value as a result of the construction of a proposed four-lane expressway, known as "Relocated Route 6," between the Connecticut towns of Bolton and Windham (Pet. App. 4a). While Relocated Route 6 has a complex procedural history (see generally *National Wildlife Federation* v. *Goldschmidt,* 504 F. Supp. 314 (D. Conn. 1980), aff'd, 677 F.2d 259 (2d Cir. 1982)), the Department of Transportation has now approved a final environmental impact statement and environmental assessment for the project pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*, and 23 C.F.R. Pt. 771 (see Pet. App. 6a). Construction of the highway cannot begin,

however, unless and until the United States Army Corps of Engineers grants Connecticut a permit, pursuant to 33 U.S.C. (& Supp. III) 1344, authorizing the filling of wetlands, and unless the Connecticut Department of Environmental Protection issues state transportation authorities a water quality certification and an inland wetlands permit (see Pet. App. 7a).

Although federal and state officials have not yet given final approval to the Relocated Route 6 project, petitioners brought this action in United States District Court for the District of Connecticut to enjoin construction of the highway. They contended in relevant part that respondents, officials of the United States and Connecticut Departments of Transportation, failed to comply with NEPA in designing and approving the construction of Relocated Route 6. See Pet. App. 4a.

The district court dismissed petitioners' claim on ripeness grounds. The court noted that Section 10(c) of the Administrative Procedure Act, recodified at 5 U.S.C. 704, permits judicial review only of "final agency action." Determining whether that requirement is satisfied, the court continued, turns on an " 'evaluat[ion] both [of] the fitness of the [agency decisions] for judicial decision and [of] the hardship to the parties of withholding court consideration.' " Pet. App. 5a (quoting *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148-149 (1967)).

Here, the court found it "evident that the environmental impact statement and environmental assessment may have to be revised, or that the plans for the highway may have to be altered or even abandoned, as a result of the evaluations that still must be undertaken by the Corps of Engineers and the [Connecticut] Department of Environmental Protection" (Pet. App. 7a-8a). In these circumstances, the court concluded "that the issues raised by [petitioners] are not yet fit for judicial decision" (*id.* at 8a).

Conversely, the court noted that its refusal to consider petitioners' claims now will not affect the environment,

since construction cannot begin until further agency action is taken (Pet. App. 9a). And while the court recognized that the individual petitioners might be discomfitted by the acquisition of their property through Connecticut's exercise of its eminent domain power, the district judge explained that petitioners will be paid just compensation for that property and may be able to reacquire the property if construction ultimately is not approved (*id.* at 9a & n.3). The court therefore held that whatever "hardships may be suffered by [petitioners] are substantially outweighed by the benefits that may be gained by deferring judicial review until the administrative decision to build the proposed highway becomes truly 'final' " (*id.* at 9a). The court dismissed petitioners' claims "without prejudice to renewal upon the completion of [final] administrative action" (*id.* at 10a; see *id.* at 7a n.2).

The court of appeals affirmed by order "for substantially the reason stated" by the district court. The court of appeals also noted that its decision "is without prejudice to whatever rights plaintiffs may have in state court to challenge under state law the State of Connecticut's acquisition of property in connection with a proposed highway project." Pet. App. 2a.

2. The fact-bound decisions below are correct and do not warrant this Court's consideration. As this Court has explained:

> The basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements * * *." In *Abbott Laboratories,* which remains our leading discussion of the doctrine, we indicated that the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration."

Pacific Gas & Electric Co. v. *Energy Resources Comm'n,*

461 U.S. 190, 200-201 (1983) (quoting *Abbott Laboratories,* 387 U.S. at 148-149). In this case, it is undisputed that both federal and state authorities must make additional environmental assessments before construction may begin on the Relocated Route 6 project. On such a record, the courts below plainly were correct in holding that the issues here are unfit for judicial review, and that postponing consideration of petitioners' claims will not cause undue hardship. As the court of appeals put it in dismissing an earlier challenge to the construction of Relocated Route 6, "[a] decision * * * at this stage would resolve a dispute about a hypothetical highway. Courts have no business adjudicating the legality of non-events." *National Wildlife Federation,* 677 F.2d at 263.

Petitioners' contention that the decision below conflicts with the holdings of this or other courts also is without merit. In *Aberdeen & Rockfish R.R.* v. *SCRAP,* 422 U.S. 289 (1975), for example (relied on by petitioners at Pet. 5-6), the Court reviewed the Interstate Commerce Commission's evaluation of the environmental impact of proposed railroad freight rates; although the rates were subject to further Commission review, their environmental impact was not. See 422 U.S. at 316-319. Petitioners' selective quotation from the Court's opinion in *SCRAP*—" 'notions of finality and exhaustion do not stand in the way of judicial review' " (Pet. 5 (quoting 422 U.S. at 319))—thus distorts the Court's meaning. The quoted phrase is preceded in the Court's opinion by the statement: "When agency or departmental consideration of environmental factors in connection with that 'federal action' is complete." Here, of course, agency consideration of environmental factors is far from complete.

The other decisions cited by petitioners also are inapposite. *National Wildlife Federation* v. *Snow,* 561 F.2d 227 (D.C. Cir. 1976) (cited at Pet. 6-7), did not involve an attempt to enjoin construction of a particular project; it

concerned, instead, a purely legal challenge to a regulation governing the conduct of public hearings. See 561 F.2d at 236. *Arlington Coalition on Transportation* v. *Volpe,* 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972); *Steubing* v. *Brinegar,* 511 F.2d 489 (2d Cir. 1975); *Environmental Defense Fund* v. *TVA,* 468 F.2d 1164 (6th Cir. 1972); and *Lathan* v. *Volpe,* 455 F.2d 1111 (9th Cir. 1971) (cited at Pet. 7), stand only for the proposition that projects may not commence or continue when *no* environmental impact statement has been prepared. And none of the other decisions cited by petitioner suggests that judicial review is appropriate when agency consideration of the environmental effects of a project is still underway.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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